No. 17-432

IN THE

Supreme Court of the United States

CHINA AGRITECH, INC.,

Petitioner,

v.

MICHAEL RESH, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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Chadbourne & Parke LLP v. Troice,
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TABLE OF AUTHORITIES (cont'd)

Page(s)

Halliburton Co. v. Erica P. John Fund, Inc.,
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In re Bank of Am. Corp. Sec., Derivative & Emp't Ret. Income Sec. Act (ERISA) Litig.,
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In re Cendant Corp. Sec. Litig.,
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Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,
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Salazar-Calderon v. Presidio Valley Farmers Ass'n,
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TABLE OF AUTHORITIES (cont'd)

Page(s)

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
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Virginia Bankshares, Inc. v. Sandberg,
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Wal-Mart Stores, Inc. v. Dukes,
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28 U.S.C. § 1658(b)(2) 22, 24-25

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OTHER AUTHORITIES

Bloomberg Law, *Interlocutory Appeal of Class Certification Decisions Under Rule 23(f): An Untapped Resource* (Mar. 16, 2017), https://www.bna.com/interlocutory-appeal-class-n57982085304/ 16

Cornerstone Research, *Securities Class Action Filings: 2017 Midyear Assessment* (2017) 9

David Freeman Engstrom & Jonah B. Gelbach, American Pipe *Tolling, Statutes of Repose, and Protective Filings: An Empirical Study*, 69 Stan. L. Rev. Online 92 (2017) 23-24

TABLE OF AUTHORITIES (cont'd)

Page(s)

H.R. Rep. No. 104-369 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730 ..... 7-8, 11-12

John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534 (2006) 11

Mukesh Bajaj et al., U.S. Chamber Institute for Legal Reform, *Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation* (2014) 8

Stefan Boettrich & Svetlana Starykh, NERA, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* (2017) 8, 9, 10, 24

U.S. Chamber Institute for Legal Reform, *Securities Class Action Lawsuits: More Common and More Lucrative* (May 25, 2017), http://www.instituteforlegalreform.com/resource/securities-class-action-lawsuits-more-common-and-more-lucrative 8-9

TABLE OF AUTHORITIES (cont'd)

Page(s)

U.S. Chamber Institute for Legal Reform, *Securities Class Action Litigation: The Problem, Its Impact, and the Path to Reform* (2008) 8

INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is comprised of hundreds of member securities firms, banks, and asset managers. Because its members are frequent targets of securities class action litigation, SIFMA has an interest in the efficient and timely resolution of these lawsuits. That interest is furthered by securities laws—including federal statutes and the judicial decisions that interpret them—that aim to strike the right balance between allowing investors to pursue meritorious claims on a timely basis, and protecting defendants from frivolous filings or the protracted threat of liability.

Respondents' position in this case—that a ruling that dismisses a putative class action plaintiff's claims or rejects class treatment, made after the statute of limitations has run, does not foreclose formerly absent class members from subsequently filing new, otherwise untimely class actions—raises an issue of particular importance to the securities industry. Respondents' position, if accepted by this Court, would upset the delicate balance of interests created by Congress and lead to abusive and protracted class action litigation—with profound harm on SIFMA's members, the judiciary, and the

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[1] All parties have consented to this filing in letters on file with the Clerk of the Court. No counsel for a party has authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief.

national economy without corresponding benefit to investors.

SUMMARY OF ARGUMENT

SIFMA supports Petitioner's arguments that the tolling doctrine of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), does not permit a formerly absent class member to bring a subsequent class action outside the applicable limitations period. While the implications of the Court's decision in this case will impact class actions in all areas of law, SIFMA submits this brief to highlight the problems posed by Respondents' perpetual tolling rule from the perspective of the securities industry.

I. Respondents' tolling rule results in adverse policy consequences that do not arise when tolling is limited to individual actions. As multiple courts of appeals have observed, recognizing tolling for subsequent class actions invites abusive litigation. Even if plaintiffs' claims are unquestionably inadequate or unsuitable for class treatment, plaintiffs are free to hit (and re-hit) the replay button until they find a court willing to see things differently. The result of Respondents' proposed rule, therefore, would be abuse of defendants and the federal courts. While this danger would be present in all types of class actions, it would be particularly acute in the context of securities class actions, where the negative consequences of excessive litigation are well-recognized. This Court's recent decision in *California Public Employees' Retirement System v. ANZ Securities,*

Inc., 137 S. Ct. 2042 (2017), underscores these points, as the Court highlighted the particular danger posed by limitless litigation in the securities industry in refusing to allow an untold number of subsequent actions to piggyback off of one timely-filed securities class action. Respondents' tolling rule would also impede the settlement of class actions and result in protracted securities litigation, which would harm the parties, the courts, investors, and the American taxpayer.

II. A rule that would allow a formerly absent class member to file an otherwise untimely class action years after the outset of the litigation pursued by a previously appointed lead plaintiff would also undermine Congress's carefully-crafted framework for efficiently and fairly prosecuting class claims. More than two decades ago, Congress enacted the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (the "PSLRA"), to curb what it identified as abusive, lawyer-driven securities litigation. Among the many reforms that the PSLRA put in place were detailed mechanisms for consolidating similar class actions and appointing a "lead plaintiff," which were aimed at preventing duplicative lawsuits and shifting the balance of power to control the litigation from counsel to the most adequate class representative. The system that the PSLRA has developed is a product of both statutory language and judicial interpretation: the statute provides for lawsuits asserting similar claims to be consolidated and a single lead plaintiff to be chosen early in the litigation, and courts have vested that representative with complete authority over the

litigation. Defendants, in turn, are provided with a level of certainty concerning the nature and content of the class claims early in the litigation, allowing them to plan their defenses and gather necessary evidence while it is still fresh.

By contrast, Respondents' proposed regime would upend this balance by allowing a formerly absent class member to surface years after the outset of the litigation—after another plaintiff had been chosen as the lead plaintiff and after the statute of limitations had lapsed—and surprise defendants with a separate class complaint. The prejudice to defendants, moreover, is not offset by any benefit, as Respondents' stated goal of avoiding duplicative class action filings at the start of the litigation is already accomplished by the procedures for consolidation in the Federal Rules, the multi-district litigation process, and the PSLRA.

In addition to undermining the PSLRA, Respondents' tolling rule undercuts the established procedure for interlocutory appellate review of class certification decisions under Rule 23(f). The Federal Rules already provide an avenue for putative class members to challenge a ruling denying class certification, one that can be used only in limited circumstances. Respondents' proposed regime, however, would permit plaintiffs to challenge an unsatisfying class certification order over and over simply by filing a new, otherwise untimely class action lawsuit as soon as class certification is denied in the first case. Plaintiffs may thus re-litigate class certification

before the same district court judge (or even a judge in another district) innumerable times.

III. This potential for abusive, protracted, and inefficient litigation would not be mitigated by a rule permitting tolling only in limited circumstances, or by the presence of non-tollable statutes of repose in certain securities laws. A rule allowing plaintiffs to re-litigate class actions to cure "representative-specific" defects—for which this Court's class-action jurisprudence provides no authority—would have the same potential for abuse as a more expansive tolling rule. As for statutes of repose, whether or not a statute of limitations is coupled with a statute of repose, statutes of limitations are designed to achieve a separate and critical purpose: to require diligent prosecution of known claims. Respondents' rule frustrates this congressional goal and makes the statute of limitations virtually illusory by allowing a plaintiff who knows of a claim to sit on the claim and refrain from taking any action not just during the (shorter) limitations period, but for the entirety of the (longer) repose period.

ARGUMENT

I. EXTENDING *AMERICAN PIPE* TOLLING TO SUBSEQUENT CLASS ACTIONS WOULD HAVE PERNICIOUS EFFECTS IN SECURITIES CLASS ACTIONS

A decision extending *American Pipe* to authorize otherwise untimely subsequent class actions would have adverse consequences that do

not arise when tolling is limited to individual actions, including generating abusive or open-ended litigation and impeding settlement of class actions. Though these consequences would be felt in all kinds of class actions, they are particularly troublesome in the context of securities class actions.

A. Tolling Would Breed Abusive Securities Litigation (and Re-litigation)

"The tolling rule of *American Pipe* is a generous one, inviting abuse." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (Powell, J., concurring); *see also Am. Pipe & Constr. Co.*, 414 U.S. at 561 (Blackmun, J., concurring). Respondents' proposed extension of the rule poses just such dangers, particularly in the securities class action context.

1. Respondents' perpetual tolling rule would "afford plaintiffs the opportunity to argue and reargue the question of class certification" or a dismissal motion "by filing new but repetitive complaints" as soon as the prior class action is dismissed or class action certification is denied. *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987). Plaintiffs' lawyers could continue to stack one meritless class action on top of another—actions that describe the same events, assert the same class, and contain the same shortcomings under Rules 12(b)(6) and 23—until they find a court that is willing to sustain the complaint or certify the class. *Yang v. Odom*, 392 F.3d 97, 113 (3d Cir. 2004) (Alito, J., concurring and dissenting); *see also*

Ewing Indus. Corp. v. Bob Wines Nursery, Inc., 795 F.3d 1324, 1326 (11th Cir. 2015) (reasoning that a perpetual tolling rule "would allow a purported class almost limitless bites at the apple as it continuously substitutes named plaintiffs and relitigates the class certification issue"); *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11-12 (1st Cir. 1998) (describing the danger of abuse presented by allowing potential class members to stack subsequent class actions to stretch out limitations periods); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) (same).

2. This danger of abuse is particularly acute with respect to securities class actions, which "pose a special risk of vexatious litigation," to the detriment of the national economy. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006).

a. It was "significant evidence of abuse in private securities lawsuits" that prompted Congress, in 1995, to pass the PSLRA. H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730; *see also Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1068 (2014); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313, 320-22 (2007); *Dabit*, 547 U.S. at 81-82 (2006). The House and Senate Committees that adopted the PSLRA heard evidence that class action lawyers were routinely filing fishing-expedition lawsuits "whenever there [was] a significant change in an issuer's stock price, without regard to any underlying culpability of the

issuer," and abusing the discovery process to extort costly settlements of these meritless claims. H.R. Rep. No. 104-369, at 31. Congress concluded that these abuses and others were injuring "the entire U.S. economy." *Id.* at 31-32.

b. In the twenty-plus years since then, frequent securities litigation has continued to threaten the health of the national economy. Securities class actions impose large—and growing—costs on American businesses and their investors. *See, e.g.*, Stefan Boettrich & Svetlana Starykh, NERA, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* (2017) ("NERA 2016 Report"), at 28-29 (Jan. 23, 2017) (reporting that, in 2016, the average settlement amount exceeded $72 million, nearly double the number from just two years before); Mukesh Bajaj et al., U.S. Chamber Institute for Legal Reform, *Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation*, at 2-3 (2014) (concluding that shareholders lose $39 billion annually upon the announcement of securities class action lawsuits—nearly eight times the annual average of $5 billion that they collect in settlements). These costs have made U.S. capital markets less attractive to companies considering where to list their securities and may now be deterring companies from going public at all. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Securities Class Action Litigation: The Problem, Its Impact, and the Path to Reform*, at 9-14 (2008); U.S. Chamber Institute for Legal Reform, *Securities Class Action Lawsuits: More Common and More Lucrative* (May 25, 2017), http://www.institute

forlegalreform.com/resource/securities-class-action-lawsuits-more-common-and-more-lucrative.

c. Allowing plaintiffs to litigate and re-litigate the same securities class action until they strike success would impede Congress's effort to reign in abusive securities litigation at a critical time when federal securities class actions are *already* on the rise. In 2016, 300 such actions were filed, the highest of any year since 2001. *See* NERA 2016 Report, at 2. As for 2017, plaintiffs filed 226 federal securities class actions in the first half of the year alone—the most filings on record since the enactment of the PSLRA. *See* Cornerstone Research, *Securities Class Action Filings: 2017 Midyear Assessment*, at 1 (2017). In the face of rising litigation, the securities laws should continue to discourage the filing of meritless lawsuits.

3. The Court's recent decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), underscores these points. Just last Term, the Court rejected the argument that "the bringing of [a] class action would make any subsequent action raising the same claims timely." *Id.* at 2054. Of course, that is *precisely* the import of a perpetual tolling rule that would allow plaintiffs to stack one class action after another until the complaint is finally sustained or the class finally certified. Equally to the point, the Court also recognized, once again, the particular danger posed by limitless litigation in the securities context, observing that "certainty and reliability . . . are a necessity in a marketplace where stability and reliance are essential components of valuation

and expectation for financial actors." *Id.* at 2055; *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188-89 (1994) (observing that the securities laws are "an area that demands certainty and predictability" (internal quotation marks omitted)). The same considerations warrant rejecting Respondents' identical argument in this case.

B. Tolling Would Impede Settlement of Class Actions, Including Securities Class Actions

Respondents' tolling rule would also make it more difficult to efficiently settle class actions, including securities class actions. Empirical evidence demonstrates that federal securities cases where motions for class certification are filed are resolved *after* the district court rules on the motion *over half the time*. *See* NERA 2016 Report, at 22. As Petitioner explains, this makes sense: Plaintiffs typically have little incentive to settle claims while a motion for class certification is pending, as the value of their claims could go up if the motion is granted. But they have a strong incentive to settle or dismiss their claims if their motion is denied, as the value of their claims would be greatly diminished. Under Respondents' proposed regime, however, a decision denying class certification would no longer be a potential inflection point at which the dispute might be settled. It would instead be an invitation to try to certify an identical class led by different named plaintiff. *See* Pet. for Writ of Cert. ("Pet."), at 26.

The parties, the courts, investors, and the American taxpayer suffer when securities lawsuits are prolonged and resources are expended needlessly. *See* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1540-41 (2006) (explaining that federal securities class actions "consume significant judicial resources" and are thus "essentially subsidized by the U.S. taxpayer"). As a result, this Court has stated that it "would reject any theory" that raised the prospect of "protracted" litigation under the securities laws. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1106 (1991). A theory that extends *American Pipe* to subsequent class actions should be no exception.

II. RECOGNIZING TOLLING FOR SUBSEQUENT SECURITIES CLASS ACTIONS WOULD UNDERMINE THE PSLRA AND RULE 23(F)

Apart from producing pernicious policy consequences, extending *American Pipe* to allow a formerly absent class member to file an otherwise untimely class action years after the outset of the litigation undermines the PSLRA and Rule 23(f) to solve a non-existent problem.

A. Among the many reforms that the PSLRA put in place to curb abusive securities lawsuits was the "lead plaintiff" provision, which took aim at a significant source of the abuse: duplicative, "lawyer-driven litigation." *Tellabs*, 551 U.S. at 322. Under the pre-PSLRA regime, plaintiffs' lawyers were incented to "race to the courthouse" with

competing lawsuits brought in the names of figurehead plaintiffs with little-to-no interest in representing a plaintiff class. *See* H.R. Rep. No. 104-369, at 33. Congress's solution to this problem was a detailed mechanism requiring the first to file to provide early notice to members of the proposed class of their right to move the court to lead the class, thereby encouraging other persons who wanted to serve as lead plaintiff to come forward early and file a motion or complaint in the first-filed matter. Congress also required the district court to choose the most capable representative from among the applicants as the lead plaintiff after a thorough vetting process. *See* 15 U.S.C. § 78u-4(a)(3). In the likely scenario where multiple identical (or nearly identical) class actions have been filed, Congress provided that the district court must rule on any motion to consolidate before appointing a lead plaintiff. *See id.* § 78u-4(a)(3)(B)(ii).

The PSLRA thus seeks to achieve Congress's goal of curbing duplicative, lawyer-driven litigation by encouraging all interested parties to apply to serve as lead plaintiff at the early stages of the case, providing for the consolidation of similar class actions, and "empower[ing]" the single most adequate lead plaintiff "to exercise control over the litigation as a whole." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 82 n.13 (2d Cir. 2004); *see also In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 192 (3d Cir. 2005). For example, the lead plaintiff has the authority to decide which claims to assert and allegations to make on behalf of the class, and those decisions are binding during the pendency of

the original class action; other plaintiffs cannot bring separate class actions during that time, with separate lead plaintiffs and separate lead counsel, that assert claims or make allegations that the lead plaintiff decided not to pursue. *See, e.g., In re Bank of Am. Corp. Sec., Derivative & Emp't Ret. Income Sec. Act (ERISA) Litig.*, No. 09 MDL 2058 (DC), 2010 WL 1438980, at *1-3 (S.D.N.Y. Apr. 9, 2010). Plaintiffs are welcome, of course, to bring these claims individually—just not on behalf of others.

From the other side of the "v.", allowing one lead plaintiff to prosecute one consolidated class complaint provides defendants with more certainty about the scope of the class, the nature of the class claims, and the alleged facts that support those claims at a relatively early stage in the litigation. The defendants will know, for example, that they face a claim under Section 11 of the Securities Act but not Section 10(b) of the Exchange Act and that certain corporate disclosures during the class period are alleged to be false and misleading while others are not. Armed with this knowledge, defendants can mount their best defenses and preserve and collect the evidence needed to do so.

Essentially, therefore, Congress created a system where, at the outset of class action litigation: (1) all plaintiffs that want to lead the class surface; (2) all related class actions are consolidated; (3) the district court chooses the most capable representative from among the potential plaintiffs to serve as the lead plaintiff; (4) the lead plaintiff charts the course of the litigation; and

(5) defendants have information they need to plan their defenses.

B. Recognizing tolling for subsequent securities class actions would needlessly undermine Congress's carefully-crafted system and could result in undue prejudice to defendants.

1. Respondents seek the right to have a formerly absent class member—one who did not even move to serve as lead plaintiff when litigation first was filed—file and lead a new class action, perhaps even in a new court, years after the outset of the litigation and after the statute of limitations has run. Because this new lawsuit would be filed after the first set of class action lawsuits had been dismissed, there would be no existing lawsuits with which the new lawsuit could be consolidated, and it would thus subsist as a separate complaint. This proposed regime could result in pernicious outcomes. The new plaintiff no doubt would argue that he is the master of his own complaint and of his own action and that decisions and strategic choices made by any other named plaintiff in a prior dismissed case are not binding on him. Defendants, in turn, would be put in the position of having to defend against allegations that may have been tangential in the prior complaint many years after the alleged fraud occurred. For example, the new lead plaintiff may focus its Section 11 claims on *different* alleged misstatements. To defend against this new emphasis of the prior claim, defendants may have to collect entirely new evidence—for example, that the plaintiff "knew of" the alleged misstatement, 15 U.S.C. § 77k(a), or

that the misstatement caused no loss to that plaintiff, 15 U.S.C. § 77k(e). Documentary evidence, however, may already be lost, and recollections may not be as fresh, meaning that defendants are deprived of the ability to mount a defense.

2. These costs come with no corresponding benefit to investors or the court system. Respondents assert that their proposed rule aims to keep "class member[s] [from] multiply[ing] litigation by filing [class action] suits . . . at the outset of the initial class action," lest the weight of these filings crush the courts. Br. of Resp'ts in Opp'n to Pet. for Writ of Cert. ("Opp."), at 22. The PSLRA, the Federal Rules, and the multi-district litigation process, however, already provide established procedures for managing the existence of multiple class plaintiffs and class actions. *See* Pet. 24-25; Reply Br. of Pet'r in Supp. of Pet. for Writ of Cert. ("Reply"), at 11. Indeed, the PSLRA *encourages* multiple class plaintiffs to come forward early in the litigation; healthy competition for the lead plaintiff position helps ensure that the chosen plaintiff will take the wheel from counsel and steer the litigation in the direction of the class's best interests.

3. While it is possible for a new lead plaintiff to file a new class complaint years after the litigation has started but before the limitations period has lapsed (like the *Smyth* action in this case), Congress has limited the time period within which such a new complaint could be filed. Even then, the fact that Congress's system occasionally

functions less-than-ideally is no reason to adopt a rule that would cripple it completely. To the contrary, strict enforcement of the statute of limitations is necessary to prevent this abusive practice from becoming commonplace or aggravated. All parties involved benefit when the appropriate class representative and class counsel are chosen to prosecute a class action once and for all early in the litigation (and certainly within the statute of limitations period); plaintiffs receive vigorous representation of their interests, defendants needed certainty, and the courts the ability to adjudicate the same or similar claims most efficiently. Tolling rules must promote, rather than undermine, these goals.

C. Respondents' proposed rule also undermines the Federal Rules by permitting plaintiffs to circumvent the established procedure for interlocutory appellate review of class certification decisions. *See* Fed. R. Civ. P. 23(f). Under Rule 23(f), a court of appeals may permit an appeal from an order denying (or granting) class certification only under limited circumstances, and the courts often choose not to: indeed, one study found that only twenty-three percent of the petitions for interlocutory appeal filed since 2012 have been accepted by the courts of appeals. *See* Bloomberg Law, *Interlocutory Appeal of Class Certification Decisions Under Rule 23(f): An Untapped Resource* (Mar. 16, 2017), https://www.bna.com/interlocutory-appeal-class-n57982085304/. Thus, while the district court's decision on class certification is generally not revisited during the pendency of the district court litigation, Respondents' proposed rule

would permit plaintiffs to challenge that ruling over and over again by the expedient of filing a new class action lawsuit before a new judge and with new evidence.

Once again, this evil is particularly pronounced in securities class action lawsuits. For example, in a Rule 10b-5 class action, plaintiffs may satisfy the reliance element by invoking a rebuttable presumption of class-wide reliance based on the "fraud-on-the-market" theory. *See Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"), 134 S. Ct. 2398, 2408 (2014); *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988). In order to benefit from the presumption, plaintiffs are subject to a three-phase burden-shifting regime where: (1) plaintiffs must prove, among other predicates, that the security traded in an efficient market, which they may do by showing that the security price generally reflects public, material information; (2) defendants are able to rebut plaintiffs' general proof of market efficiency by showing that the security price did not reflect the particular alleged misstatements; and (3) plaintiffs then counter that evidence with evidence that it did. *See Halliburton II*, 134 S. Ct. at 2415-16. As this Court has recognized, proof of the requisite "market efficiency" is offered in the form of fact-intensive expert evidence, such as complex regression analyses that seek to show that the security price takes account of public, material information about the company, including the misstatements at issue. *See id.* Plaintiffs are incentivized to develop and offer their best evidence from the get-go; if, as happens, the district court rejects plaintiffs' expert or finds plaintiffs' evidence

insufficient to satisfy their burden, the class certification question is resolved—subject only to the court's discretionary determination whether to deny without prejudice. Under Respondents' proposed regime, by contrast, plaintiffs have the luxury to test novel theories or argue for a relaxed burden of proof, safe in the understanding that, if the district court rejects their more creative arguments, (unlikely) appellate review will not be their only recourse. Rather, they could litigate the question of market efficiency over and over again, each time offering more conventional and more well-developed evidence, until they find a district court judge willing to certify the class.

III. NEITHER A LIMITED TOLLING RULE, NOR A STATUTE OF REPOSE, IS THE SOLUTION

The harmful consequences of Respondents' proposed expansion of *American Pipe* would not be mitigated by a tolling rule that allows successive class actions only in limited circumstances, or by the presence of non-tollable statutes of repose in certain securities laws.

A. Permitting Subsequent Class Actions to Cure "Representative-Specific" Defects Would Not Eliminate Abuse

A tolling rule that would allow successive class actions only in limited situations—where the district court denied class certification based on a "representative-specific," rather than a "class-specific," defect—finds no support in this Court's precedents and invites the same abusive and

protracted litigation as a more expansive tolling rule.

1. This Court's precedents do not support a tolling rule that relies on an artificial distinction between representative-specific and class-specific defects. To the contrary, this Court has recognized that representative-specific issues bleed into class-specific ones. This Court has stated, for example, that Rule 23's "adequacy-of-representation requirement tend[s] to merge with [its] commonality and typicality criteria." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (first alteration in original) (internal quotation marks omitted). More recently, this Court has explained that adequacy of representation is the common thread linking all of Rule 23(a)'s requirements: "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (internal quotation marks omitted). Thus, any shortcoming in the ability of the named plaintiff to represent the class *is* a class-specific shortcoming—and any class action plagued by a "representative-specific" defect is just as unworthy of resuscitation as one suffering from a "class-specific" problem.

2. Assuming that one can neatly carve Rule 23 into representative- and class-specific

prerequisites, a perpetual tolling rule that applies only where class certification was denied based on a representative-specific defect still encourages protracted and abusive litigation.

a. As an initial matter, a rule that turns on the basis for the denial of class certification would not address the potential for abuse arising from the re-litigation of an adverse ruling on a pre-certification motion to dismiss. But the same is true even when the subsequent class action seeks to re-litigate class certification. As then-Judge Alito recognized, district courts may not always make it clear whether their rulings denying class certification rest on representative- or class-based problems. *See Yang*, 392 F.3d at 114 (Alito, J., concurring and dissenting). Seizing on the ambiguity, class action lawyers could re-characterize class-specific defects into representative-specific ones, *see id.*, resulting in costly and time-consuming litigation over this threshold issue. The proceedings in this case well illustrate this point: Respondents characterize the first round of class plaintiffs' failure to establish predominance under Rule 23(b)(3) as a "plaintiff-specific failure in an expert report," while Petitioner calls the problem a class-wide defect. Opp. 5; Reply 2 n.1.

Moreover, even if district courts' orders are crystal-clear on this point, there is little difference between permitting plaintiffs to re-litigate the adequacy of the class representative after the statute of limitations has run and allowing the untimely re-litigation of any other Rule 23 issue. "Endless rounds of litigation" could result in either

case as plaintiffs "piggyback one class action onto another" until they prevail. *See Ewing Indus. Corp.*, 795 F.3d at 1328 (internal quotation marks omitted).

b. To be sure, application of the statute of limitations to prevent successive class action lawsuits would prohibit a second class action even in those cases where the would-be class was simply "unlucky enough to rely upon an inappropriate lead plaintiff." *Yang*, 392 F.3d at 111. But the Court need not rewrite *American Pipe* to avoid that result. Even without the extension of *American Pipe* sought by Respondents, a new class action lawsuit can be filed within the statute of limitations period if the first lead plaintiff is determined to be inappropriate. Perhaps more to the point, as demonstrated above, pursuant to the PSLRA, each member of the would-be class receives notice, at the very beginning of the litigation, of the pendency of the lawsuit and an invitation to file his own class action lawsuit and to move the court to serve as the lead plaintiff. A formerly absent class member who surfaces years later either ignored this notice or affirmatively decided that it did not want to pursue claims on behalf of the class. In either case, the formerly absent class member should not benefit from *American Pipe* tolling, regardless of why the court denied class certification.

B. Statutes of Repose Are at Best a Weak Barrier to Re-litigation of Meritless Class Certification Issues, and No Substitute for Statutes of Limitations

Finally, Respondents' argument that this Court's recent decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017)—which held that *American Pipe* tolling does not apply to statutes of repose—has "mitigated[,] if not rendered moot," concerns about endless re-litigation in class actions, Opp. 3, is incorrect.

1. *First*, as Petitioner points out, statutes of repose—or absolute time bars—are relatively rare in federal statutes. *See* Reply 6. Most statutory schemes consist of a single limitations period without an additional outer limit to safeguard against serial litigation. Thus, in many class action contexts, the supposed protection against abuse that *CalPERS* provides is nonexistent.

2. *Second*, while Congress has adopted statutes of repose in a number of federal securities laws,[2] the fact that these time bars are non-tollable under

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[2] *See, e.g.*, 28 U.S.C. § 1658(b)(2) (five-year repose period applicable to securities fraud claims under Section 10(b) of Exchange Act); 15 U.S.C. § 77m (three-year repose period applicable to claims under Sections 11 and 12(a)(2) of Securities Act); 15 U.S.C. § 78i(f) (three-year repose period applicable to price manipulation claims); 15 U.S.C. § 78r(c) (three-year repose period applicable to claims under Section 18 of Exchange Act); 15 U.S.C. § 78p(b) (two-year repose period applicable to short-swing profit claims).

CalPERS does little to assuage concerns about needless re-litigation of class actions. The pairing of a shorter (tollable) statute of limitations with a longer (non-tollable) statute of repose gives plaintiffs a window of opportunity in which to squeeze new lawsuits, if the district court grants a motion to dismiss or denies class certification somewhere in the middle.

a. This case illustrates the point. Respondents brought a third identical securities class action after the applicable two-year limitations period was up but before the five-year repose period blocked it. *See* 28 U.S.C. § 1658(b). If *American Pipe* applies to successive class actions, Respondents' repeat action is timely despite the presence of a non-tollable repose period in the statutory scheme.

b. Empirical evidence demonstrates that this case is not an anomaly. According to a recent study of securities class actions filed in the period from 2002 through 2009, in cases that asserted claims under Section 10(b) of the Exchange Act and reached a certification decision (like this case), the applicable five-year statute of repose lapsed before the court ruled on class certification in only forty-four percent of cases. *See* David Freeman Engstrom & Jonah B. Gelbach, American Pipe *Tolling, Statutes of Repose, and Protective Filings: An Empirical Study*, 69 Stan. L. Rev. Online 92, 98 (2017). This data suggests that the non-tollable time bar is an ineffective barrier to re-litigation in as many as *over half* of Section 10(b) cases in which plaintiffs' first try at class certification fails. Similarly, even in cases that asserted claims under

only Section 11 or Section 12 of the Securities Act, which are subject to a shorter three-year statute of repose, that statute had not expired in over *one quarter* of the cases that reached a class certification ruling. *See id.* Thus, in many cases, the statute of repose does not stand in the way of serial litigation.

The statute of repose is an even weaker barrier to re-litigation following the dismissal of a class action complaint, which generally occurs earlier in the litigation than the denial of a class certification motion. Indeed, half the cases dismissed in 2016 were done so within *less than one year* of filing, the fastest pace since the passage of the PSLRA. *See* NERA 2016 Report, at 24. Thus, plaintiffs are left with plenty of opportunity to file new class actions before either a three-year or a five-year statute of repose expires.

3. *Third*, Respondents' rule accords insufficient respect to the independent role that Congress intended statutes of limitations to serve in the federal securities laws. Statutes of limitations are "designed to encourage plaintiffs to pursue diligent prosecution of known claims." *CalPERS*, 137 S. Ct. at 2049 (internal quotation marks omitted). Thus, in cases alleging claims under Section 10(b) of the Exchange Act, the two-year statute of limitations ensures that all potential plaintiffs who know, or could have known, of a claim bring their claim within a two-year period. 28 U.S.C. § 1658(b)(1). The five-year statute of repose, in turn, functions as a limited safety net that protects plaintiffs who *do not know*, or *could not have known*, of a claim

through no fault of their own; under the current regime, those plaintiffs receive the benefit of equitable tolling so that they may bring their claim within five years. *Id.* § 1658(b)(2); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991). *American Pipe* tolling permits those plaintiffs who otherwise would timely file their own independent claims to forbear from doing so during the limitations period in reliance on the understanding that a class certification motion will be granted.

Respondents' argument, however, turns on its head *American Pipe* tolling and would make the statute of limitations virtually illusory. Under their view, a plaintiff who knows of a claim and otherwise would be required to bring it timely can sit back and refrain from taking any action to diligently prosecute its claims for an extended time period. As long as one class action is timely filed within the two-year limitations period, all putative class members can hold back and not bring any claim, safe in the understanding that if one court determines that the first putative action does not provide a basis for class-wide relief, another plaintiff will step forward and bring a new action within five years. The two-year statute of limitations would no longer have any real meaning.

CONCLUSION

For the foregoing reasons, SIFMA urges the Court to reverse the judgment of the Circuit Court.

Respectfully submitted,

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